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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JUAN MANUEL MARTINEZ-FLORES, Defendant and Appellant.	A152675 (Napa County Super. Ct. No. CR183274)

Defendant Juan Manuel Martinez-Flores appeals his conviction of several offenses and resulting 11-year prison sentence arising out of an attack upon the woman with whom he had a prior dating and romantic relationship. He contends the evidence was insufficient to establish one of the offenses, that his attorney provided ineffective assistance in failing to request an intoxication instruction, and that his constitutional rights were violated when the court received and considered the court file establishing a prior serious felony without obtaining a knowing waiver of his rights. We find no merit in these contentions, but do agree with his supplemental argument that the matter should be remanded to permit the trial court to exercise its newly conferred discretion to strike the prior serious felony enhancement.

Background

Defendant and Norma A. at one time had been in a dating relationship and lived together. In July 2015, defendant pleaded no contest to making criminal threats and falsely imprisoning Norma by force or violence and was placed on probation, subject to a condition prohibiting him from having contact with her for three years. There was

evidence at the jury trial that on the afternoon of February 19, 2017, Norma was returning home from the store when defendant entered her moving car, placed it into park, grabbed her by the wrist, face and neck, punched her in the face, and threatened to kill her.

Defendant was charged by information with corporal injury to a former spouse or cohabitant (Pen. Code, § 273.5, subd. (a) (count 1)),[1]assault with a deadly weapon, a knife (§ 245, subd. (a)(1) (count 2)), criminal threats (§ 422 (count 3)), false imprisonment by violence (§ 236 (count 4)), and misdemeanor disobeying a court order (§ 166, subd. (a)(4) (count 5)). The information alleged that in the commission of counts 3 and 4 defendant had used a deadly weapon, a knife (§ 12022, subd. (b)(1)), and that he had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior strike conviction (§ 667, subds. (b)-(i)).

The jury found defendant guilty of the offenses charged in counts 1, 3, 4 and 5, and, under count 2, of the lesser-included offense of simple assault. The jury found not true the deadly weapon enhancement. In bifurcated proceedings the court found the prior conviction allegations true. The court imposed under count 1 the three-year minimum sentence, doubled by the second strike to six years, plus five years for the prior serious felony. Concurrent terms were imposed on the remaining convictions.

Defendant timely filed a notice of appeal.

Discussion

1. *Substantial evidence supports the conviction for making threats.*

Defendant contends there was insufficient evidence to sustain his conviction under count 3 for making criminal threats to Norma on February 19, in violation of section 422. As articulated in CALCRIM No. 1300, a violation of section 422 requires that a defendant "willfully threatened to unlawfully kill or unlawfully cause great bodily injury" to another, by some means of communication, with the intent that the statement "be understood as a threat" and be "so clear, immediate unconditional, and specific that it communicated to [the victim] a serious intention and the immediate prospect that the

[1] All statutory references are to the Penal Code.

threat would be carried out;" and the threat must actually cause the victim "to be in sustained fear for her own safety" or the safety of her immediate family. In general, "the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.)

Defendant contends that the evidence here was insufficient to establish that his threat was "so unequivocal, unconditional, immediate, and specific as to convey to [Norma] a gravity of purpose and an immediate prospect of execution." The evidence described prior confrontations between defendant and Norma And on February 19, 2017, Norma testified, as she was returning home and in the process of parking her car, defendant "appeared out of nowhere and got into the car suddenly. And then I told him, 'Get out. Get out." As the car was still moving, defendant pushed the lever between the two front seats "toward parking and he did it with such force that it popped," the car turned off. Defendant "started struggling with me . . . and then he threatened me. He threatened me. [¶] . . . [¶] . . . [H]e was trying to grab me to choke me." "He grabbed me by the wrist very strongly, then I tried to defend myself. I grabbed him . . . and I tore his shirt." Defendant punched her, told her she "had ruined his life" and that "worse things would happen to me than to him." He held a knife to her neck. He "yelled at me that my mom was going to be sorry, like — that my mom was going to suffer my loss. [¶] . . . [¶] That I was a prostitute, that no man was going to love me. [¶] . . . [¶] That my family was going to worry about me because . . . he said that he was going to kill me." Defendant then left the car, threw the knife into the car, and walked toward the entrance to Norma's apartment building. Norma called the police "for fear that he would return and complete his threat of what he had said previously" when he had threatened to kill her.[2]

[2] Norma's testimony was somewhat disjointed, jumping back and forth and not entirely consistent temporally. At one point she testified: "He wasn't aware of what he was doing.

Shortly later in Norma's direct examination, the following exchange took place:

"Q. When he had the knife to your neck, how did you feel?

"A. I felt at the same time sad and upset. I did not have an awareness, because I didn't know. I was like beside myself, bewildered.

"Q. Were you scared?

"A. Yes.

"Q. Did you think he was going to kill you?

"A. I didn't think about that. I just thought he was going to hurt me, to injure me.

"Q. Did you think he was going to hurt you with the knife?

"A. No. I think he was just trying to scare me.

"Q. It worked though, right? Were you scared?

"A. Oh, yeah.

"Q. You told us earlier there were many things he said to you that day?

"A. Insults.

"Q. You had told us earlier he had also told you he was going to kill you?

"A. He did say that, but I don't think he's the kind of person who would do that.

"Q. When he held the knife to your neck, what was he saying at that time?

"A. That I was going to regret it.

"Q. Is that the same time he told you that your mother would be sorry.

"A. Yes.

"Q. And that she would suffer?

"A. Yes.

". . . [¶] . . .

"Q. After he ran, what did you do?

He was drugged. I don't know what his problem was. Then when he reacted, he got off, he got out of the car, he yelled at me and that's when he had another knife."

"A. I drove around -- I drove around the block once more and then towards Franklin Street. Then I wasn't sure if I should call the police, if I should file a report or not.

". . . [¶] . . .

"Q. Why did you not know whether you should call the police or not?

"A. Well, I was, like, afraid. I was very scared at that moment. I did not know – I didn't know how to react.

"Q. Who was it that had scared you. Were you scared of the police?

"A. No. Afraid of him."

While this testimony included answers that may have provided grist for defendant's argument to the jury that defendant's threats were not unequivocal or immediate, or that Norma did not so understand them, in the full context of the testimony the jury could reasonably have concluded otherwise. Given a history of prior violent exchanges and the physical violence that occurred on this occasion, defendant's words could well be understood to threaten future violence and to have caused Norma to fear such. As in *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221, "Defendant's words, combined with the surrounding circumstances, are susceptible to an interpretation that defendant made a grave threat to [the victim's] personal safety." "Several appellate decisions have held, in the context of determining whether conditional, vague or ambiguous language could be the predicate for a conviction of making terrorist threats, that all of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422. This includes the defendant's mannerisms, affect, and actions involved in making the threat . . . ." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

The facts in cases cited by defendant, in which the courts held there was no violation of section 422, provide a stark contrast to the facts here. In *In re Ryan D., supra,* 100 Cal.App.4th 854, a minor angry with a police officer painted a picture of a man shooting the officer and turned it in as an art class project a month later. "[T]he painting was ambiguous as the threat of an intent to commit murder. And the surrounding

circumstances were not sufficient to convey a gravity of purpose and immediate prospect of execution of such a threat, or even to demonstrate that the minor intended to convey *any* threat to [the officer].” (*Id.* at p. 865.) Similarly, in *In re George T.* (2004) 33 Cal.4th 620, a poem that one high school student showed other students, reading in part, “I can be the next kid bringing guns to kill students at school,” “and the circumstances surrounding its dissemination fail to establish that it was a criminal threat because the text of the poem, understood in light of the surrounding circumstances, was not ‘so unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638; see also, e.g., *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139 [student’s angry statement to his teacher that “I’m going to get you” not a “true threat within the meaning of section 422”].)

“Claims challenging the sufficiency of the evidence to uphold a judgment are generally reviewed under the substantial evidence standard. Under that standard, ‘ “an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.” ’ [Citations.] ‘ “ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” ’ ” (*In re George T., supra,* 33 Cal.4th at pp. 630-631.) Under this standard, we have no doubt that the evidence is sufficient here to support the conviction under section 422.

2. *Defense counsel did not provide ineffective assistance.*

Defendant also contends that his attorney provided ineffective assistance in failing to request a voluntary intoxication instruction, in light of Norma’s testimony that defendant “wasn’t aware of what he was doing. He was drugged” and “That’s not the way he behaves when he is [in] a normal state. Only when he is under the influence of

drugs." However, as the Attorney General argues, despite Norma's suspicions ("I don't know what his problem was"), there was no testimony that would have supported such an instruction. There was no testimony that defendant had in fact consumed drugs or alcohol prior to the events in question, that he was in fact intoxicated, or that he was unable to form the intent necessary to violate section 422 as a result of intoxication. Hence, there was no basis for such an instruction. (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661-1662.) Moreover, such an instruction would have been inconsistent with defendant's basic defense that he had not engaged in any misconduct. The failure to request the instruction therefore undoubtedly reflects a tactical decision of counsel, itself negating the claim of ineffective assistance. (*People v. Olivas* (2016) 248 Cal.App.4th 758, 770-772.) In short, there is no basis to conclude that counsel's performance was deficient, much less that it was prejudicial.

3. *Defendant was not denied constitutional rights by submission of court records to substantiate the prior offenses without obtaining a waiver of his rights.*

Defendant next contends that his attorney's submission of the prior strike and serious felony allegations upon judicial notice of the court file was tantamount to an admission without advisals on and his personal waivers of his privilege against self-incrimination and of his rights to confrontation and cross-examination, which assertedly violated his Fifth, Sixth and Fourteenth Amendment rights. He relies heavily on *People v. Farwell* (2018) 5 Cal.5th 295, in which the Supreme Court recently reversed a conviction based on the defendant's stipulation "through his counsel that admitted all of the elements of a charged crime, making it tantamount to a guilty plea" (*id.* at p. 298) without having been advised of or having expressly waived his privilege against self-incrimination or his rights to jury trial and confrontation. The court reiterated that "a plea is valid notwithstanding the lack of express advisements and waivers 'if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances' " but held that there "the record fails to affirmatively show that Farwell understood his counsel's stipulation had the effect of waiving his constitutional rights." (*Id.* at p. 298.)

Here, the record is very different. Before the start of trial defendant requested that trial of the prior offense allegations be bifurcated. The court asked whether defendant was waiving a jury on those allegations and, when counsel answered affirmatively, asked "Have you discussed that with your client?" Counsel responded he had not and the proceedings were paused to permit him to do so. When proceedings resumed, counsel stated "He's willing to waive a jury," and the court then addressed the defendant directly: "So Mr. Martinez-Flores, in addition to the trial relating to the facts of this case, you also have a prior conviction that has been alleged, and my understanding from your attorney is that you're willing to have that issue decided by me, the judge, rather than a jury. Is that correct, sir?" Defendant responded "Yes" and the court indicated the issue would be bifurcated and "the jury is waived on that issue." The record thus provides no basis to question defendant's understanding of his voluntary waiver.

Moreover, the courts have long upheld the voluntary waiver of a defendant's "right to a jury trial on the truth of the prior prison term allegation . . . [without objection] when documentary evidence is introduced." (*People v. Marella* (1990) 225 Cal.App.3d 381, 384.) "Appellant merely waived his right to a jury trial on the prior prison term allegation. At the court trial, the People were still required to present evidence to prove the prior. Appellant retained the right to challenge the validity of the People's evidence, to question any witnesses, to subpoena and call witnesses in his defense or to take the witness stand in his own behalf. Under the circumstances, appellant did not 'incriminate himself by an "involuntary confession of guilt" ' or 'surrender the right to confront and cross-examine the witnesses against him' by agreeing to a court rather than a jury trial." (*Id.* at p. 387, fn. omitted.) There was no violation of defendant's constitutional rights here.

4. *Defendant is entitled to a remand to permit the trial court to exercise its newly granted discretion to strike the five-year enhancement.*

Defendant's sentence includes a five-year enhancement imposed pursuant to section 667, subdivision (a). When defendant was sentenced, imposition of the enhancement was mandatory, but by Senate Bill No. 1393, effective January 1, 2019, the

trial court has subsequently been granted discretion to strike the enhancement. In a supplemental brief, defendant has sought a remand so that the court may exercise its discretion in this respect. Under the rationale of *In re Estrada* (1965) 63 Cal.2d 740, the Attorney General agrees that defendant is entitled to a remand for this purpose.

Disposition

The matter is remanded to permit the trial court to determine whether to strike the enhancement imposed pursuant to Penal Code section 667, subdivision (a). In all other respects the judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.